INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS

FROM: Joe Truce

DATE: May 8, 2002

RE: **BOARD'S EN BANC DECISION MAKES IT CLEAR THAT L.C.§5813 SANCTIONS WILL BE IMPOSED FOR THE NEGLIGENT FAILURE TO ADVISE THE BOARD AS TO THE NAME OF THE PROPER DEFENDANT**

I have previously issued memorandums reminding everyone that it is of the utmost importance that we establish through the claims administrator the **identity** of our client and specifically whether or not our client is permissibly self-insured (pursuant to the laws of California) or is insured by an insurance carrier.

This is a fairly easy determination if our client happens to be an insurance carrier. However, when the claims administrator is **not** an insurance company but is a third party administrator such as Crawford & Company, GAB or Gallagher Bassett Services, our job may be somewhat more difficult.

Although we may assume **that the employer is permissibly self-insured** in cases administered by a third-party administrator, this assumption may have unfortunate consequences as pointed out by the Appeals Board in the En Banc Decision of the **Cheryl Coldiron V. Compuware,** permissibly self-insured by and through Gallagher Bassett Services, Inc., adjusting agency.[1]

In the **Coldiron** case both the defense attorney and apparently the claims administrator **"assumed"** that the employer, Compuware, was permissibly self-insured in the state of California for its workers' compensation liability.

This **"assumption"** continued throughout the life of this case- for some six years. It was only when a Findings & Award issued that the claims administrator- in preparing to pay the Award- discovered that Compuware was not permissibly self-insured and, in fact, had obtained insurance through the Reliance National Insurance Company.

Unfortunately by this time Reliance had become **insolvent** and all Reliance claims were being paid

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[1] A summary of the En Banc Decision of the Board in the **Coldiron** case is enclosed as summarized in the Appeals Board Reporter, 4/5/02 edition.

MEMO TO ALL ATTORNEYS/ALL OFFICES/CLIENTS

RE: BOARD'S EN BANC DECISION MAKES IT CLEAR THAT L.C.§5813 SANCTIONS WILL BE IMPOSED FOR THE NEGLIGENT FAILURE TO ADVISE THE BOARD AS TO THE NAME OF THE PROPER DEFENDANT

by the California Insurance Guarantee Association (CIGA).

In its Petition for Reconsideration the defense attorney requested that the Findings & Award be amended to show that the employer was actually insured through Reliance National Insurance and that the Award be amended to note that Compuware was insured by Reliance- as opposed to being self-insured for its workers' compensation liability.

The Board granted reconsideration and advised as follows:

> **"In this case we hold that where the employer's liability for workers' compensation benefits is adjusted by a third-party administrator, the administrator must disclose to the workers' compensation Appeals Board, to the other parties in any proceeding in which it is a party, and to its own counsel the identity of its client, whether a self-insured employer or insurance carrier. If the client is an insurance carrier the administrator must disclose whether the policy includes a "high self-insured retention," a large deductible, or any other provision that effects the identity of the entity actually liable for the payment of compensation. Failure of the administrator to disclose the identity of its client may subject it to sanctions pursuant to L.C. §5813 . . . "**

In light of this decision we must re-double our efforts in finding out the identity of the actual client when reporting to a third-party administrator.

In the **Coldiron** case, the employer, Compuware, may have to pay the Findings & Award unless the Board amends the Award to show that Reliance is actually the insurance carrier.

WJT:wf
Enclosure- Appeals Board Reporter, 4/5/02- **Coldiron** case

3d PARTY ADMIN.

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHERYL COLDIRON, *Applicant,* vs. COMPUWARE; Permissibly Self-Insured, by And through GALLAGHER BASSETT SERVICES, INC., Adjusting Agent, *Defendants.*	Case No. SRO 0088351 NOTICE OF INTENTION TO IMPOSE SANCTIONS AND NOTICE OF INTENTION TO HOLD COMMISSIONER'S CONFERENCE (EN BANC)

On November 26, 2001, the Workers' Compensation Appeals Board (Board) granted the petition for reconsideration filed by Compuware Corporation (Compuware or petitioner) in which defendant Compuware challenged the Findings and Award that issued by the workers' compensation administrative law judge (WCJ) on August 31, 2001. In that decision, the WCJ followed and adopted the stipulations of parties as true in finding, among other things, that Cheryl Coldiron (applicant), born October 6, 1955, sustained an admitted industrial injury to her neck and back on January 13, 1995 while employed by Compuware, *permissibly self-insured.* The WCJ awarded in applicant's favor and against Compuware various benefits including temporary disability, permanent disability indemnity of $28,203, less specified credit to defendant for applicant's third-party recovery, and further medical treatment.

The sole issue raised by defendant in its petition for reconsideration is the entity against whom the benefits should have been awarded by the WCJ. Petitioner's attorney asserts that he first learned on September 5, 2001 that at the time of the industrial injury herein, Compuware was insured for workers' compensation benefits by Reliance National Insurance Company (Reliance).[1]

[1] Based upon documents filed by defendant, Reliance is now in liquidation.

Petitioner characterizes the relationship of Reliance to Compuware as a carrier with "a high self-insured retention." Petitioner requests that the Award be amended *nunc pro tunc* to reflect the proper defendant entity, Reliance. Petitioner asserts that the error was due to "excusable error" which was brought to the WCJ's attention upon discovery. Petitioner states that the amendment would not prejudice applicant.

After granting reconsideration, because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this case to the board as a whole for an en banc decision. (Lab. Code, §115.)[2]

In this case we hold that where an employer's liability for workers' compensation benefits is adjusted by a third-party administrator, the administrator must disclose to the Workers' Compensation Appeals Board, to the other parties in any proceeding in which it is a party, and to its own counsel the identity of its client, whether a self-insured employer or insurance carrier.[3] If the client is an insurance carrier, the administrator must disclose whether the policy includes a "high self-insured retention," a large deductible, or any other provision that affects the identity of the entity actually liable for the payment of compensation. Failure of the administrator to disclose the identity of its client may subject it to sanctions pursuant to Labor Code section 5813.

In this case the third-party administrator failed to disclose the true identity of its client until more than six years after the date of the injury. On our own motion, we will issue notice that sanctions may be ordered against the third-party administrator. We will schedule a Commissioner's Conference for clarification of the relationship between Compuware and Reliance, and whether sanctions should be imposed. The merits of defendant's petition for reconsideration will be dealt with in our decision after reconsideration.

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[2] The Board's en banc decision are binding precedent on all Board panels and WCJs. (WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.)

[3] Labor Code section 3700 enumerates the various ways by which employers must secure payment of workers' compensation benefits, including insurance and self-insurance.

I. BACKGROUND

At all times prior to September 5, 2001, all participants before the Board identified the defendant Compuware as the *permissibly self-insured* employer of applicant at the time of her industrial injury. This is reflected in the Application for Adjudication filed by applicant on January 6, 1996 at the Santa Rosa office of the Workers' Compensation Appeals Board, by petitioner's Declaration of Readiness filed on October 19, 1998, as well as in subsequent documents of the petitioner filed at the Santa Rosa Board in this matter.[4]

Indeed, at the Mandatory Settlement Conference (MSC) held on March 2, 1999,[5] the parties submitted signed stipulations in which it was stipulated that applicant, born October 6, 1955, while employed on January 13, 1995, as a sales person, at Alameda, California, by "Compuware Corp." sustained industrial injury to her neck and back and claims to have sustained right shoulder, right upper extremity injury, and at the time of injury the employer was "permissibly self-insured." At trial on May 3, 1999, this stipulation remained unchanged.

On August 31, 1999, the WCJ issued Findings and Award in which, among other things, the WCJ followed the stipulations of the parties and adopted them as true including the stipulation that applicant at the time of her industrial injury was employed by "Compuware, permissibly self-insured." Accordingly, benefits were awarded against that entity. Subsequently, petitioner filed a petition for reconsideration in which various issues were raised but there was no challenge to the identity of the employer as being permissibly self-insured. On October 6, 1999 the WCJ ordered the August 31, 1999 Findings and Award rescinded pursuant to WCAB Rule 10859 (Cal. Code Regs., tit. 8, § 10859). By conference held November 2, 1999, the matter was resubmitted with no mention of changing the identity of the employer from designating it as being permissibly self-insured.

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[4] For example, see defendant's Pretrial Brief dated May 3, 1999 indicating Gallagher Bassett Services, Inc. as adjusting agent for the defendant employer; defendant counsel's letters to the WCJ dated 3/4/99, 3/3/99, 2/1/99, and 11/9/98 identifying the "Carrier" as Gallagher Bassett Services for the employer Compuware Corporation.

[5] WCAB 10563 (Cal. Code Regs., tit. 8, § 10563) requires that the defendant shall have settlement authority at the MSC but the person with that authority need not be present if such authority is available by telephone. There is a question as to what entity gave the underlying settlement authority in this case for meaningful settlement discussions at the MSC.

After other procedural matters, the WCJ requested that the parties supplement the record by examination of Dr. Feinberg, and the case once again was taken under submission for decision on March 8, 2001. The Minutes of that proceeding reflect no change to the previous stipulations. The Findings and Award now being challenged by petitioner issued on August 31, 2001 in which the WCJ again followed and adopted as true the stipulations of the parties, including that the employer against whom the award issued was permissibly self-insured.

By letter to the WCJ dated September 5, 2001, petitioner's attorney for the first time disclosed that Compuware was insured by Reliance National Insurance, adjusted by Gallagher Bassett Services, Inc. The letter stated, in pertinent part:

> "In reviewing this matter with our client, we learned that there had been an error made a few years ago at the MSC Conference. At that time, defendants indicated that Compuware Corporation was permissibly self-insured, by and through Gallagher Bassett Services, Inc. We now understand that for the date of the injury, Compuware was insured by Reliance National Insurance, adjusted by Gallagher Bassett Services, Inc., as its adjusting agent.
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> "We respectfully request that the Award be amended to note Compuware as insured by Reliance National Insurance Company and that the finding be made against them."

Apparently after hearing nothing from the WCJ, the petitioner on September 24, 2001 filed the instant petition for reconsideration in which it requested that Reliance be identified as insuring Compuware and that the Award of August 31, 2001 be amended to show that benefits are awarded against Reliance. In her answer to the petition for reconsideration, applicant requests that the petition be denied because the award was based on written stipulations signed by the parties which identified Compuware as permissibly self-insured. Applicant also points out that the petitioner admitted at the Mandatory Settlement Conference held in March of 1999 that Compuware was permissibly self-insured and that this is confirmed by numerous documents and recitations in open court by petitioner. Contrary to petitioner's assertion, applicant claims that she would be prejudiced by this late and untimely joinder of a new defendant since Reliance is insolvent.

In her October 10, 2001 Report and Recommendation on the petition for reconsideration, the WCJ recommends that the petition be denied for the following reasons, in part:

> "At no time either by the original letter [dated September 5, 2001] or by the Petition for Reconsideration, does defendant offer any evidence in support of their excusable error. It is simply a statement by the attorney that some unnamed person at Gallaher Bassett [adjusting agent] has indicated that some unnamed broker gave instructions, presumably based on agreement with an employer representative, which were not followed. For more than five years, this case has been proceeding with information that Compuware was self-insured and adjusted by Gallagher Bassett. Indeed, the original Findings and Award [of August 31, 1999] is two years old. While that decision was rescinded [on October 6, 1999], at no time up until the present was there ever any indication that Compuware was ever anything but self-insured. Now, we are asked to change the designation of proper defendant, without any evidence or verified affidavits, documents, bankruptcy petitions, etc. being filed. We are being asked to accept third hand hearsay of what the broker did with the employer."

Defendant's petition raises questions regarding the meaning of "high self-insured retention," whether a "deductible" exists in the context of worker's compensation insurance policies. Is the alleged policy with Reliance an insurance policy that contains limitations which provide for employer primary liability at the outset up to a certain amount of liability, with the carrier thereafter responsible, or with potential reinsurance or excess insurance taking over at a different and higher level of liability? Is the employer's liability to the carrier in the form of essentially an indemnification agreement, with the carrier billing the employer directly for sums expended and requesting reimbursement, or some other deductible type approach? There is a question of who is the primary liable entity, the carrier or the employer, or both. These and other questions will be the subject of a Commissioner's Conference in this case as well as whether sanctions should be imposed as previously identified. Subsequent to the proceeding and final submission of the case for determination, a decision after reconsideration will issue.

II. DISCUSSION

Labor Code section 5813 provides, in relevant part:

> "The . . . appeals board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In addition, . . . the appeals board, in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars ($2,500) to be transmitted to the General Fund."

WCAB Rule 10561 (Cal. Code of Regs., tit. 8, § 10561) provides, in relevant part:

> "On its own motion . . ., the Workers' Compensation Appeals Board may order payment of reasonable expenses, including attorney's fees and costs and, in addition, sanctions as

> provided in Labor Code section 5813. Before issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard. In no event shall the Appeals Board, . . . impose a monetary sanction pursuant to Labor Code section 5813 where the one subject to the sanction acted with reasonable justification or other circumstances make imposition of the sanction unjust.
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> "A bad faith action or tactic is one which results from a willfull failure to comply with a statutory or regulatory obligation or from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board."

Fundamental to the establishment of workers' compensation liability and the prompt delivery of benefits awarded to eligible injured workers is the designation of the responsible and liable entity. The responsible entity must be divulged at the earliest opportunity, and certainly no later than the commencement of the litigation process and formal proceedings. More specifically a third-party administrator must inform the Board and its counsel, if any, no later than at least the commencement of any litigation in the case, who the third-party administrator's client is, whether a self-insured employer or an insurance carrier. In this manner, no confusion can result as to the liable entity, against whom an award for benefits will be made. It avoids unnecessary delays in the prompt delivery of benefits awarded.

The importance of the prompt designation of the liable entity is underscored in the instant case where it appears that the now disclosed carrier is in liquidation and the California Insurance Guarantee Association (CIGA) may have liability. (Ins. Code § 1063, *et seq.*) For over six years, in the present case, it appears Gallagher Bassett Services, Inc.[6] failed to disclose the correct entity for whom it administered applicant's claim. Such behavior is unacceptable and appears to provide a basis for the imposition of sanctions. Accordingly, a notice of intention to sanction Gallagher Bassett Services, Inc. will issue whereby the adjusting agent will be afforded an opportunity to provide good cause why sanctions should not be imposed under Labor Code section 5813.

In addition, a notice of intention will issue to hold a Commissioner's Conference with the parties at the Santa Rosa office of the Workers' Compensation Appeals Board for clarification of

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[6] By letter from defendant's attorney dated December 31, 2001, the Board is advised that effective November 26, 2001, Fleming & Associates of Glendale, California, has become the new adjusting agent for the further administration of claims.

the basis for the arrangement between Compuware and Reliance, and whether compliance with the provisions of the Insurance Code have been met (Ins. Code §§ 11650 *et seq.*, particularly §§ 11657, 11659, and 11660.). The conference is necessary to give the Board a complete understanding of the arrangement between the entities, whether sanctions should be imposed, and to enable us to issue a just and reasoned decision after reconsideration on the issue raised by the petition for reconsideration.

For the foregoing reasons,

NOTICE IS HEREBY GIVEN that this matter is set for a COMMISSIONER'S CONFERENCE before James C. Cuneo, Commissioner, at the Santa Rosa local office of the Workers' Compensation Appeals Board, 50 "D" Street, #420, Santa Rosa, CA 95404-4760, on APRIL 18, 2002, at 10:00 A.M. (one hour), and for such further proceedings deem appropriate.

FURTHER NOTICE IS HEREBY GIVEN that absent demonstration of good cause to the contrary at the COMMISSIONER'S CONFERENCE identified above, the Worker's Compensation Appeals Board will order Gallagher Bassett Services, Inc. to pay SANCTIONS of $1,500 to Dennis J. Hannigan, Secretary, Workers' Compensation Appeals Board, at P.O. Box

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429459, San Francisco, CA 94141, ATTENTION: Reconsideration Unit, for transmission to the General Fund, pursuant to Labor Code section 5813.

COLDIRON, Cheryl